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Pascoe, Susan ORCID logo ORCID: <https://orcid.org/0000-0001-8618-2842> (2011) Europe, human rights and land law in the 21st century: an English example. Property Law Review, 1 (3) . pp. 179-196. ISSN 1838-3858 [Article]

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Europe, human rights and land law in the 21st century: An English example

Susan Pascoe*

The central theme of this article is an examination of the influences of Europe and human rights law on English land law. The Supreme Court decisions in Manchester City Council v Pinnock and Hounslow LBC v Powell are pivotal in aligning English land law with human rights principles in relation to public authority landowners under the European Convention on Human Rights. This article analyses six developments in the law: first, the gradual diminution of the “wide margin of appreciation” of national authorities; second, the modification of the stance towards human rights in repossession cases; third, difficulties pertaining to proportionality; fourth, the continuing significance of the Wednesbury test of unreasonableness; fifth, the impact of human rights on proprietary certainty in English land law; and last, whether possession proceedings will become based on fair outcomes.

INTRODUCTION

This article analyses how land law in England is being modified by European influences and a human rights agenda in the context of public authority landowners seeking repossession. Although the analysis is within the context of public authority landowners, the influences may have repercussions beyond this sphere. Hidden behind the terminology of “proportionality” and “gateways” lies the deeper question of whether obtaining possession will in the future become dependent on fair outcomes, with the tensions continuing to reveal as much about the fluctuating state of human rights as they do about the conflicting pressures within land law. *Manchester City Council v Pinnock* [2010] UKSC 45; [2010] 3 WLR 1441 and *Hounslow LBC v Powell* [2011] UKSC 8; [2011] 2 WLR 287 are landmark Supreme Court cases, which place English domestic law in closer harmony with the jurisprudence of the *European Convention on Human Rights*, by qualifying an automatic right to possession. Enabling elements of unpredictability to determine the outcome of possession proceedings creates problems for traditionalists used to crystalline rules, specifically designed to discourage litigation.

This article examines six developments emerging from the quandary in which English judges have found themselves as a result of the tensions between certainty and fairness: first, the gradual diminution of the “wide margin of appreciation” of national authorities; second, the modification of the stance towards human rights in repossession cases; third, difficulties pertaining to proportionality; fourth, the continuing significance of the *Wednesbury* test of unreasonableness derived from *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223; fifth, an assessment of the impact of human rights on proprietary certainty in English land law; and last, whether possession proceedings will become based on fair outcomes. English land law has traditionally thrived in its isolation from Europe and civilian systems of law, but has needed disparate and nuanced approaches over the centuries, with the law evolving to answer different questions at different periods of history.¹ The independence of spirit of the law is being challenged, intensifying questions as to how far the law can maintain its distinct identity.

* Solicitor, Principal Lecturer, Middlesex University. The author thanks Professor Kevin Gray for his very helpful comments on a draft of this article. The author is also grateful to the two anonymous referees for their constructive feedback on this article. All errors and omissions are, of course, the sole responsibility of the author.

¹ See Simpson AWB, *A History of the Land Law* (2nd ed, Clarendon Press, 1986); Anderson JS, *Lawyers and the Making of English Land Law 1832-1940* (Clarendon Press, 1992); Spring E, *Law, Land and Family: Aristocratic Inheritance in England 1300 to 1800* (University of North Carolina Press, 1993).

HUMAN RIGHTS: TENSIONS BETWEEN CERTAINTY AND FAIRNESS

An increasingly important source of downward pressure on English land law is the interpretation and application of human rights in relation to public authority landowners, not only by the European Court of Human Rights, but also by the United Kingdom Supreme Court in contrast to the stance taken by the House of Lords. The focus of the human rights discussion is Art 8 of the *European Convention on Human Rights*, namely the right to respect for the home, subject to interference by a public authority for the protection of the rights and freedoms of others. The rationale behind this focus is that Art 8 encapsulates the dilemma of whether an individual has acquired new proprietary protection as a result of the Convention.

English judges were striving to resolve their dilemmas of how to apply Art 8(2)² for seven years from *Harrow LBC v Qazi* [2003] UKHL 43; [2004] 1 AC 983 in 2003 until *Pinnock* in 2010. The law has in essence swung from one end of the spectrum to the other. At one end is the majority of the House of Lords in *Qazi*, *Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 AC 465 and *Doherty v Birmingham City Council* [2008] UKHL 57; [2009] 1 AC 367, endeavouring to uphold automatic rights to possession to bolster certainty and national self-determination. At the other end, in *Pinnock* and in *Powell*, is the dignified acceptance by the unanimous Supreme Court that possession is not automatic and is subject to proportionality.

The Supreme Court in *Pinnock* and in *Powell* has provided long-awaited guidance that a right to possession by local authority or social housing landowners is qualified by whether the eviction is a proportionate means of achieving a legitimate aim in order to comply with human rights obligations. *Pinnock* and *Powell* apply to local authorities and other social landlords to the extent that they are public authorities under the *Human Rights Act 1998* (UK). The actual decision in *Pinnock* was that the demoted tenancy regime is compatible with Art 8. Demoted tenancies³ enable local housing authorities and other social landlords to apply to the court for a demotion order, which terminates the secure tenancy from the date specified and creates a demoted tenancy in circumstances where the anti-social conduct or unlawful use, or the threat of such conduct or use, has taken place, and where it is reasonable to make the order. Subsequently, under the *Housing Act 1996* (UK),⁴ the landlord of a demoted tenancy may only bring the tenancy to an end by obtaining an order for possession. *Powell* was the leading case in three conjoined appeals,⁵ which dealt in the *Powell* case itself with a licence to occupy a dwelling house owned by a local authority, pursuant to its duties towards the homeless,⁶ and in the other two cases with introductory tenancies.⁷ *Powell* followed *Pinnock*, so that the propositions applied in *Pinnock* to demoted tenancies were extended to the cases in *Powell*.

The reason that *Pinnock*, and subsequently *Powell*, are pivotal cases is that, by disapproving of the approach of the majorities in the House of Lords in *Qazi*, *Kay v Lambeth LBC* and *Doherty*, they require a rebalancing of English jurisprudence. *Pinnock* and *Powell* apply the reasoning of the European Court of Human Rights analysed in *Kay v United Kingdom* [2011] HLR 2 and preceding cases. The judgments of the House of Lords were becoming increasingly unsustainable in the light of

² Article 8(2) of the *European Convention on Human Rights* states that: "There shall be no interference by a public authority with the exercise of this right [the right to respect for private and family life, home and correspondence] except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

³ Created under the *Housing Act 1985* (UK), s 82A.

⁴ *Housing Act 1996* (UK), s 143D.

⁵ The other cases were *Leeds City Council v Hall* [2011] UKSC 8; [2011] 2 WLR 287 and *Birmingham City Council v Frisby* [2011] UKSC 8; [2011] 2 WLR 287.

⁶ *Housing Act 1996* (UK), Pt VII.

⁷ *Housing Act 1996* (UK), Ch 1 of Pt V. An introductory tenancy remains an introductory tenancy until the end of the trial period of one year (s 125(2)) and does not become a secure tenancy until the end of the trial period. The Supreme Court held that the *Housing Act 1996* (UK), s 127(2), relating to termination of an introductory tenancy, could be read compatibly with the *Human Rights Act 1998* (UK) and given effect to enable the county court judge to deal with a defence which relied on an alleged breach of Art 8.

the Court of Human Rights' decisions. A milestone has been reached with the Supreme Court acknowledging that it should now accept the minority views of the House of Lords in *Qazi*, *Kay v Lambeth LBC* and *Doherty*. The minority views were summed up in *Pinnock* by Lord Neuberger who stated that:

if our law is to be compatible with article 8, where a court is asked to make an order for possession of a person's home at the suit of a local authority, the court must have the power to assess the proportionality of making the order, and, in making that assessment, to resolve any relevant dispute of fact.⁸

The question to be analysed is how far-reaching the decisions in *Pinnock* and *Powell* are. Article 8 may be perceived as a new hurdle to the making of a possession order, especially where domestic law imposes no requirement of reasonableness and gives an unqualified right to an order for possession. Alternatively, it may be that the decisions align the common law with the European Convention on Human Rights to the smallest degree possible to conform to the Convention. If that is so, then in most cases, possession will be virtually automatic and only if there are exceptional circumstances, which will be narrowly defined, or if the scheme itself is entirely contrary to the Convention, will possession be resisted on human rights grounds. Lord Neuberger was keen to emphasise the importance of recognising proprietary claims to possession, making it clear that:

Unencumbered property rights, even where they are enjoyed by a public body such as a local authority, are of real weight when it comes to proportionality ...

... in virtually every case where a residential occupier has no contractual or statutory protection, and the local authority is entitled to possession as a matter of law, there will be a very strong case for saying that making an order for possession would be proportionate.⁹

If that approach is followed then, in the vast majority of cases, Art 8 will have minimal impact.

Gradual diminution of the “wide margin of appreciation” of national authorities?

Prior to *Pinnock*, the crux of the differentiation of approach adopted by the judges of the Court of Human Rights was that the Court of Human Rights' decisions are based on human and social concerns. In contrast, until *Pinnock*, the concerns of the majority (but not the minority) of judges in English courts were based on proprietary certainty. This was the fundamental underlying divergence in philosophy between the Court of Human Rights and the majority of the English judiciary who, before *Pinnock*, took a frugal approach to the effect of Art 8 on residential possession proceedings. However, even in the Court of Human Rights there has been salient progression from *Buckley v United Kingdom* (1997) 23 EHRR 101¹⁰ and *Chapman v United Kingdom* (2001) 33 EHRR 18¹¹ to *Kay v United Kingdom*. The court in the earlier cases sheltered under the necessity to balance competing interests and take refuge in “a wide margin of appreciation to national authorities, who are evidently better placed to make the requisite assessment”.¹² This approach in *Buckley* and *Chapman* was adopted despite recognition of the principles and goals of the Council of Europe's *Framework Convention for*

⁸ *Manchester City Council v Pinnock* [2010] UKSC 45; [2010] 3 WLR 1441 at [49].

⁹ *Manchester City Council v Pinnock* [2010] UKSC 45; [2010] 3 WLR 1441 at [54].

¹⁰ See Sandland R, “Developing a Jurisprudence of Difference: The Protection of the Human Rights of Travelling Peoples by the European Court of Human Rights” (2008) 8 HRL Rev 475.

¹¹ Five cases were decided on the same day, the other cases being *Beard v United Kingdom* (2001) 33 EHRR 19, *Coster v United Kingdom* (2001) 33 EHRR 20, *Lee v United Kingdom* (2001) 33 EHRR 29, *Smith v United Kingdom* (2001) 33 EHRR 30.

¹² *Chapman v United Kingdom* (2001) 33 EHRR 18 at [104].

the Protection of National Minorities,¹³ and was partly attributed to signatory states being unable to agree on methods of implementation of the Framework Convention.¹⁴

There was, however, a discernible shift in the Court of Human Rights' jurisprudence after *Chapman*, which can be seen in *Connors v United Kingdom* (2005) 40 EHRR 9 at [86] in the court's changed stance on the margin of appreciation, which "must be regarded as correspondingly narrowed". The court held unanimously that eviction of the gypsy family did violate their Art 8 rights, and that such eviction was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with the applicant's rights. As a result, the decision could not be regarded as justified by "pressing social need" or proportionate to the legitimate aim being pursued. The United Kingdom had not established a legal framework with sufficient procedural protection. The security of tenure given by the *Mobile Homes Act 1983* (UK) to travellers licensed to station their caravans on privately-owned caravan sites did not apply to local authority owned sites governed by the *Caravan Sites Act 1968* (UK). This signals a discernible manoeuvre by the court, through the articulation of a positive interpretation of Art 8 rights, resulting in a concerted policy of positive discrimination in favour of minority groups that suffer widespread and structural discrimination.¹⁵

In *McCann v United Kingdom* (2008) 47 EHRR 40 the Court of Human Rights reinforced a human rights approach to proprietary entitlement by holding unanimously that the service of a notice to quit on Mr McCann was a breach of Art 8. The reason was that under the summary procedure available to a landlord where one joint tenant served notice to quit, Mr McCann was dispossessed of his home without any possibility of having the proportionality of that measure determined by an independent tribunal. The court supported the minority view of the judges in the House of Lords in *Kay v Lambeth LBC*, and the essence of the rationale of the Court of Human Rights is summed up by its cursory conclusion:

The court does not accept that the grant of the right to the occupier to raise an issue under Article 8 would have serious consequences for the functioning of the system or for the domestic law of landlord and tenant.¹⁶

This statement, more than any other, arguably epitomises the cardinal disparity between the standpoints of the Court of Human Rights and the majority view of the House of Lords.

The decision of the Court of Human Rights in *Kay v United Kingdom* embodied the culmination of the narrowing of the broad periphery of discretion enjoyed by national authorities. The importance of the decision was the reinforcement by the court of the principle that applicants must "be able to have the proportionality of the measure determined by an independent tribunal in light of the relevant principles under art 8 of the convention, notwithstanding that, under domestic law, his right of occupation has come to an end".¹⁷ Since the county court had struck out the applicants' Art 8 defences, "the procedural safeguards required by Article 8 for the assessment of the proportionality of the interference were not observed".¹⁸ The Court of Human Rights' decision in *Kay v United Kingdom* laid the foundations for the Supreme Court's judgment in *Pinnock* and the consequential doctrinal shift.

By way of contrast, the margin of appreciation has not been diminished by the Court of Human Rights in relation to adverse possession claims. The Grand Chamber of the European Court of Human

¹³ Council of Europe Parliamentary Assembly (1995).

¹⁴ *Chapman v United Kingdom* (2001) 33 EHRR 18 at [94]. See also Gilbert G, "The Council of Europe and Minority Rights" (1996) 18 Hum Rts Q 160, examining, inter alia, the potential definitions of minorities, to whom the rights attach, whether they are human rights and whether legal rights alone are sufficient for minority protection.

¹⁵ *Sandland*, n 10 at 496.

¹⁶ *McCann v United Kingdom* (2008) 47 EHRR 40 at [54].

¹⁷ *Kay v United Kingdom* [2011] HLR 2 at [68].

¹⁸ *Kay v United Kingdom* [2011] HLR 2 at [74].

Rights in *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45¹⁹ held, by a majority of 10 votes to seven, that English law did not violate the right of landowners to peaceful enjoyment of their possessions under Art 1 of the First Protocol.²⁰ The court stressed that:

In determining whether a fair balance exists, the court recognises that the State enjoys a wide margin of appreciation, with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the objective of the law of question.²¹

The statutory provisions under the *Limitation Act 1980* (UK), which barred action to recover land after 12 years of adverse possession, pursued a legitimate aim in the general interest, and the provisions governing adverse possession under the *Land Registration Act 1925* (UK), s 75, regulated “control of use” and did not deprive the owner of possessions. Furthermore, the absence of compensation for landowners who lost their title did not constitute a violation of Art 1 of the First Protocol. The issue is now unlikely to arise under the provisions of the *Land Registration Act 2002* (UK), ss 96-98 and Sch 6,²² which introduced a new scheme in relation to adverse possession that does not have retroactive effect. This scheme strengthens the position of registered proprietors, so that the mere lapse of time cannot by itself bar the rights of a registered proprietor. In any event, following *Pye* it appears that, in the sphere of land law, the margin of appreciation is narrowing, at present, only in cases of public authority landowners seeking repossession.

Modification of the stance towards human rights in repossession cases

The judgments of Lord Hope in the English cases demonstrate the changes in the approach to human rights in repossession cases through Art 8(2). Lord Hope was the only judge to have been a judge in all the pivotal House of Lords and Supreme Court cases²³ – *Qazi, Kay v Lambeth LBC, Doherty, Pinnock* and *Powell* – and was in the majority in *Qazi, Kay v Lambeth LBC* and *Doherty*.

- Lord Hope in *Qazi*:

The county court has no discretion as to whether or not it should grant an order for possession in these circumstances. In domestic law the making of an order for possession follows automatically. It has not been suggested that the fact that this is what the law provides is itself a violation of article 8.²⁴

and

contractual and proprietary rights to possession cannot be defeated by a defence based on article 8.²⁵

- Lord Hope in *Kay v Lambeth LBC*:

¹⁹ See further Cooke E, “A Postscript to Pye” (2008) 59 NILQ 149; Panesar P and Wood J, “Adverse Possession and Article 1 of the European Convention” (2009) 30 Liverpool LR 77; Milo JM, “ECHR 30 August 2007, Pye v United Kingdom: A Technical Retreat from Private (Property) Law” (2008) 16 ERPL 353; Fox O’Mahony L and Cobb N, “Taxonomies of Squatting: Unlawful Occupation in a New Legal Order” (2008) 71 MLR 878.

²⁰ Article 1 of the First Protocol states that: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

²¹ *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 at [75].

²² The provisions of the *Land Registration Act 2002* (UK) did not apply in *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45, because the statutory provision applicable at the time was the *Land Registration Act 1925* (UK), s 75.

²³ Lord Walker was a judge in four of them, excluding *Qazi*. Lord Scott (*Qazi, Kay v Lambeth LBC, Doherty*), Baroness Hale (*Kay v Lambeth LBC, Pinnock, Powell*), Lord Brown (*Kay v Lambeth LBC, Pinnock, Powell*) and Lord Rodger (*Doherty, Pinnock, Powell*) were judges in three of them. Lord Bingham (*Qazi, Kay v Lambeth LBC*), Lord Mance (*Doherty, Pinnock*) and Lord Phillips (*Pinnock, Powell*) were judges in two of them.

²⁴ *Harrow LBC v Qazi* [2003] UKHL 43; [2004] 1 AC 983 at [74].

²⁵ *Harrow LBC v Qazi* [2003] UKHL 43; [2004] 1 AC 983 at [84].

A requirement that the article 8 issue must be considered by the court in every case by taking into account the defendant's personal circumstances would go further than a reading of these three cases, taken together and in the light of the prior Strasbourg jurisprudence, will justify.²⁶

and

I do not think that the reasoning of the majority in *Qazi* should be departed from. But I accept that the reasoning needs to be clarified. In the light of the subsequent Strasbourg cases I would now place greater emphasis on the need for the court to provide a remedy in those special cases of a kind not considered in *Qazi* where it is seriously arguable that the right to possession which is afforded by domestic law violates the Convention right. ... On balance I think that it would be better for the issue to be dealt with by way of defence to the proceedings in the county court, to the extent that the limits on the jurisdiction of that court permit it to do so ...²⁷

- Lord Hope in *Doherty*:

I would allow the appeal. I would remit the case to the judge in the High Court so that he can review the reasons that the council has given for serving a notice to quit to obtain vacant possession of the plots that the first defendant and his family occupy. It will be for the judge to resolve any dispute that he needs to resolve about the facts and, having done so, to determine whether the decision to terminate the first defendant's licence on the grounds stated in its particulars of claim, and having regard to the length of time that the first defendant and his family have resided on the site, was reasonable.²⁸

- Lord Hope in *Powell*:

This court held [in *Pinnock*] that those cases,²⁹ together with *Kay v United Kingdom* ... provided a clear and constant line of jurisprudence to the effect that any person at risk of being dispossessed of his home at the suit of a local authority should in principle have the right to question the proportionality of the measure and to have it determined by an independent tribunal in the light of article 8: para 45. The decision in *Doherty v Birmingham City Council* ... had shown that our domestic law was already moving in that direction, and the time had come to accept and apply the jurisprudence of the European court. So, where a court is asked to make an order for possession of someone's home by a local authority, the court must have the power to assess the proportionality of making the order and, in making that assessment, to resolve any relevant dispute of fact: para 49.³⁰

Lord Hope has progressed significantly from the visceral fear he expressed in *Qazi* of losing control of the legal system, and he justifies the change by being obliged to follow European jurisprudence. The House of Lords, sitting as a seven-member panel, sought to reconcile *Qazi* and *Connors* in the conjoined appeals of *Kay v Lambeth LBC* and accepted that, in so far as the ratio of *Qazi* was that the enforcement of a right to possession in accordance with the domestic law of property could never be incompatible with Art 8, this principle had to be modified in the light of *Connors*. While the case did not bolt the door against challenges under Art 8 in possession cases, it left open only the smallest of cracks.³¹

Subsequent to the House of Lords decision in *Kay v Lambeth LBC*, the Court of Human Rights in *McCann* upheld a human rights approach to Art 8 and the minority view of the House of Lords in *Kay*

²⁶ *Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 AC 465 at [109].

²⁷ *Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 AC 465 at [113].

²⁸ *Doherty v Birmingham City Council* [2008] UKHL 57; [2009] 1 AC 367 at [57].

²⁹ Decisions of the European Court of Human Rights in *McCann v United Kingdom* (2008) 47 EHRR 913, *Cosic v Croatia* (2011) 52 EHRR 39, *Zehentner v Austria* (2011) 52 EHRR 22 and *Paulic v Croatia* (App No 3572/06, 22 October 2009).

³⁰ *Hounslow LBC v Powell* [2011] UKSC 8; [2011] 2 WLR 287 at [7].

³¹ Bright S, "Article 8 Again in the House of Lords: *Kay v Lambeth LBC*; *Leeds CC v Price*" [2006] 70 Conv 294 at 308. See also Hughes D and Davis M, "Human Rights and the Triumph of Property: The Marginalisation of the European Convention on Human Rights in Housing Law" [2006] 70 Conv 526; Davis M and Hughes D, "Gateways or Barriers? Joint Tenants, Possession Claims and Article 8" [2010] 74 Conv 57.

v Lambeth LBC. The House of Lords, sitting as a five-member panel in *Doherty*,³² would not overrule the decision in *Kay v Lambeth LBC*, which had been reached by a seven-member panel, and restated that the basic rule, as laid down by the majority in *Qazi*, and reaffirmed by the majority in *Kay v Lambeth LBC*, is good law. Lord Hope reaffirmed that the facts in *Connors* and *Blecic v Croatia* (2006) 43 EHRR 48³³ were entirely different from those in *Qazi*. *Connors* was labelled an “exceedingly rare case where the legislative code or, indeed, the common law is impeachable on human rights grounds”.³⁴ It was a pity that, in *Doherty*, the House of Lords did not take the opportunity to take a bold approach to Art 8. However, in *Pinnock*, and subsequently *Powell*, the Supreme Court rose to the challenge of aligning English law with the requirements of the Court of Human Rights, and the question is how far, how deep and how wide this realignment will go.

Difficulties pertaining to proportionality

The English judiciary is still struggling with the threshold for when proportionality is triggered. The Supreme Court’s rejection, in *Pinnock*,³⁵ of the proposition that “it will only be in ‘very highly exceptional cases’ that it will be appropriate for the court to consider a proportionality argument”, is welcome, because this avoids the difficulties and complications of defining when “very highly exceptional” circumstances arise. “The question is always whether the eviction is a proportionate means of achieving a legitimate aim.”³⁶ Yet, further on in his judgment in *Pinnock*, Lord Neuberger appears to introduce a test of “exceptionality”, specifically for determination of the remedy. Lord Neuberger stated that:

if domestic law justifies an outright order for possession, the effect of article 8 may, albeit in exceptional cases, justify (in ascending order of effect) granting an extended period for possession, suspending the order for possession on the happening of an event, or even refusing the order altogether.³⁷

The problem with this approach is that, if eviction is not a proportionate means of achieving a legitimate aim, the appropriate remedy must follow, and there should not be a threshold of “exceptionality” for the remedy to be awarded. What Lord Neuberger is, in effect, advocating, is a threshold of “exceptionality” as a trigger for proportionality.

The test used by Lord Hope in *Powell* is a test of whether proportionality is “seriously arguable” since:

The court will only have to consider whether the making of a possession order is proportionate if the issue has been raised by the occupier and it has crossed the high threshold of being seriously arguable.³⁸

Lord Phillips goes even further than Lord Hope in *Powell* by agreeing with the test of “very highly exceptional cases” in relation to introductory tenancies and, in his opinion, a defendant must demonstrate that he has “substantial grounds” for advancing a proportionality argument.³⁹ Lord Phillips also extends this principle to homelessness cases. Lord Phillips appears to be retreating to the position prior to *Pinnock* by concluding that:

³² The appellant, a gypsy, had been evicted from a caravan site owned by the respondent local authority, having been served with a notice to quit by the local authority on the basis that it required vacant possession to carry out essential improvement works. The appellant and his family had been resident on the site for 17 years by the time they were evicted.

³³ See also *Loveland I*, “A Tale of Two Trespassers: Reconsidering the Impact of the Human Rights Act on Rights of Residence in Rented Housing: Part 1” [2009] 2 EHRLR 148.

³⁴ *Doherty v Birmingham City Council* [2008] UKHL 57; [2009] 1 AC 367 at [34], quoting from Lord Nicholls in *Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 AC 465 at [54].

³⁵ *Manchester City Council v Pinnock* [2010] UKSC 45; [2010] 3 WLR 1441 at [51].

³⁶ *Manchester City Council v Pinnock* [2010] UKSC 45; [2010] 3 WLR 1441 at [52].

³⁷ *Manchester City Council v Pinnock* [2010] UKSC 45; [2010] 3 WLR 1441 at [62].

³⁸ *Hounslow LBC v Powell* [2011] UKSC 8; [2011] 2 WLR 287 at [33].

³⁹ *Hounslow LBC v Powell* [2011] UKSC 8; [2011] 2 WLR 287 at [92].

the statement that it will only be in rare cases that a valid proportionality challenge can be raised by way of defence to a possession order applies equally to repossession of accommodation provided under Part VII.⁴⁰

His statement may, therefore, negate the advantages of having a single judgment delivered in *Pinnock* by Lord Neuberger, since different thresholds are being proposed by different judges. However, it may be that Lord Phillips is struggling with two rather different thresholds – the proportionality threshold and the threshold to be overcome at the first possession hearing where the occupier needs a defence which is substantial.⁴¹

Nevertheless, the Supreme Court judgments are very clear on the legitimate aims the authority can rely on to determine proportionality. The proportionality of the possession order is supported by the fact that making the order would serve to vindicate the housing provider's ownership rights and enable the authority to comply with its public duties in relation to the allocation and management of its housing stock.⁴² Lord Neuberger in *Pinnock* added that “in many cases (such as this appeal) other cogent reasons, such as the need to remove a source of nuisance to neighbours, may support the proportionality of dispossessing the occupiers”,⁴³ which will be an important factor in many cases.

Lord Phillips in *Powell* was concerned that:

these appeals raise a number of questions which are not clearly answered by the decision in *Pinnock*. Foremost among these is the question of the matters to which the court must pay regard when an issue of proportionality is raised.⁴⁴

Yet an analysis of Lord Phillips' judgment leaves the distinct impression that his judgment goes little further than *Pinnock* in providing general advice. The Supreme Court has not provided clear guidance on how to balance an occupier's personal circumstances against the local authority's legitimate aims in determining the proportionality of making a possession order. Direction is needed, in particular, “in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty”, referred to by Lord Neuberger in *Pinnock*.⁴⁵ This was an issue highlighted in that case by the Equality and Human Rights Commission.

In *Powell*, Lord Hope avoids dealing with specific cases in which the personal circumstances of occupiers will trump the local authority's ownership rights. The only guidance given by Lord Hope is that:

The court need be concerned only with the occupier's personal circumstances and any factual objections she may raise and ... with the question whether making the order for possession would be lawful and proportionate. If it decides to entertain the point because it is seriously arguable, it must give a reasoned decision as to whether or not a fair balance would be struck by making the order that is being sought by the local authority: *Kryvitska and Kryvitskyy v Ukraine* given 2 December 2010, para 44.⁴⁶

No specific examples are given, and the Supreme Court has arguably reneged on its pivotal role to provide guidance to lower courts to ensure parameters of consistency.

Lord Phillips arguably adopts a more human rights based approach than Lord Hope. Lord Phillips tackles an important element of the issue when he states:

⁴⁰ *Hounslow LBC v Powell* [2011] UKSC 8; [2011] 2 WLR 287 at [113], referring to the *Housing Act 1996* (UK), Pt VII.

⁴¹ See *Civil Procedure Rules 1998* (UK), r 55.8(2), which applies where “the claim is genuinely disputed on grounds which appear to be substantial”.

⁴² *Manchester City Council v Pinnock* [2010] UKSC 45; [2010] 3 WLR 1441 at [52] and *Hounslow LBC v Powell* [2011] UKSC 8; [2011] 2 WLR 287 at [35]. In *Kryvitskyy v Ukraine* (App No 30856/03, 2 December 2010) at [46], the Strasbourg Court indicated that the first aim on its own will not suffice where the owner is the state itself, but taken together, the twin aims will satisfy the legitimate aim requirement.

⁴³ *Manchester City Council v Pinnock* [2010] UKSC 45; [2010] 3 WLR 1441 at [52].

⁴⁴ *Hounslow LBC v Powell* [2011] UKSC 8; [2011] 2 WLR 287 at [75].

⁴⁵ *Manchester City Council v Pinnock* [2010] UKSC 45; [2010] 3 WLR 1441 at [64].

⁴⁶ *Hounslow LBC v Powell* [2011] UKSC 8; [2011] 2 WLR 287 at [37]. Lord Hope also uses the terminology “lawful and proportionate” at [44].

It is possible to envisage a proportionality challenge before the judge being based on exceptional personal circumstances which have nothing to do with the reasons for seeking the possession order.⁴⁷

But he does not provide any advice on how county courts should deal with such a challenge. Lord Phillips recognised that an attack on the proportionality of dispossession is more normal where it amounts to an attack on the reasons given to the tenant for seeking the possession order, but again does not grapple with the more difficult issues relating to exceptional personal circumstances.⁴⁸ An important consequence of the decisions is that landlords will need to overhaul the internal management of their housing procedures to demonstrate that all factors have been taken into account in reaching a proportionate decision. This will inevitably require written documentation demonstrating the considerations taken into account in reaching a considered decision prior to initiating proceedings for possession.

As Arden has pointed out, in Strasbourg the subjectivity of the question does not lead to vast differences, because there are only 47 judges, sitting in five sections of nine or 10 each, whereas there are more than 3,000 county court judges (circuit, district, recorder and deputy) who may need to exercise judgment.⁴⁹ Arden is harsh in his criticisms of *Pinnock* and *Powell* for the paucity of theory, and the absence of the rigorously reasoned, precedent-based approach for which the Supreme Court and, prior to that, the House of Lords, has been world-renowned.⁵⁰ Arden's view is that the Strasbourg decisions relied on in *Pinnock* and *Powell* are noticeable for their brevity and contain "templates" – paragraphs cut and pasted from earlier decisions – which reflect a procedural element to Art 8. However, any jurisdiction based on precedent will use template paragraphs, and the jurisdiction is as yet immature. It was inevitable in the long term that the United Kingdom would follow the jurisprudence of the Strasbourg Court, and that the Supreme Court would defer to Strasbourg, not only in the conclusion but also in its approach. The court did, however, recognise in *Pinnock*⁵¹ that the wide implications of the obligation under Art 8(2) to consider the proportionality "will have to be worked out", which "is best left to the good sense and experience of judges sitting in the county court". This may be an abdication of responsibility or, construed in a more benevolent light, may be a realistic assessment of the practicalities of the way in which Art 8(2) needs to operate.

Continuing significance of Wednesbury test of unreasonableness?

The fundamental concept utilised in domestic judicial review cases has conventionally been "Wednesbury unreasonableness", derived from *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 at 230; that is, where a decision is "so unreasonable that no reasonable authority could ever have come to it", subsequently termed "irrationality".⁵² Prior to *Pinnock*, there had been considerable judicial tension in relation to the grounds for judicial review where the statute gives a public authority an unqualified right to recover possession. Lord Hope in *Kay v Lambeth LBC*⁵³ and subsequently in *Doherty*⁵⁴ set out gateways (a) and (b) as constituting the only grounds upon which a decision can be challenged. Gateway (a) is the compatibility challenge, where it is arguable that the domestic law itself, which enables the court to make the possession order, is incompatible with Art 8. Gateway (b) is the challenge on conventional judicial review grounds, challenging the decision of a public authority to recover possession as an improper exercise of its

⁴⁷ *Hounslow LBC v Powell* [2011] UKSC 8; [2011] 2 WLR 287 at [91].

⁴⁸ In *Hounslow LBC v Powell* [2011] UKSC 8; [2011] 2 WLR 287 at [111]-[113], Lord Phillips tackles Issue 3 – the type of factual issues which will be relevant to any proportionality determination, but the scope of that discussion is very narrow.

⁴⁹ Arden A, "Whose Rights? Whose Reasons?" (2011) 14 JHL 47 at 48.

⁵⁰ Arden, n 49 at 50.

⁵¹ *Manchester City Council v Pinnock* [2010] UKSC 45; [2010] 3 WLR 1441 at [57].

⁵² See also *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410 per Lord Diplock.

⁵³ *Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 AC 465 at [110].

⁵⁴ *Doherty v Birmingham City Council* [2008] UKHL 57; [2009] 1 AC 367 at [37]-[55].

powers on the ground that “the decision is one which no reasonable person would consider justifiable”,⁵⁵ which encompasses whether the decision “was arbitrary, unreasonable or disproportionate”.⁵⁶

Although proportionality is not a distinct ground for review in non-Convention rights cases, even in such cases:

the time has come to recognise that this principle [proportionality] is part of English administrative law, not only when judges are dealing with Community acts but also when they are dealing with acts subject to domestic law. Trying to keep the *Wednesbury* principle and proportionality in separate compartments seems to me to be unnecessary and confusing.⁵⁷

There have been judicial calls for the abandonment of the *Wednesbury* test, with recognition that only the House of Lords/Supreme Court can “perform its burial rites”.⁵⁸

However, there are different levels of review in different types of cases, and the problem with proportionality, as opposed to traditional judicial review, has been that it is akin to ruling on the substance or merits of the case, infringing on the separation of powers between the Executive and judiciary. Yet, even in this area, Lord Hope in *Doherty*⁵⁹ recognised that “it would be unduly formalistic to confine the review strictly to traditional *Wednesbury* grounds”, since the considerations which can be taken into account are wider. This raises the issue as to where the boundaries lie between reasonableness and personal circumstances, especially since Lord Hope in *Doherty*⁶⁰ explicitly recognised subjective factors under the head of reasonableness by stating that “the length of time that the first defendant and his family have resided on the site” is relevant, thus potentially allowing for personal circumstances to be smuggled into gateway (b). Despite regarding *Connors* as exceptional, the result of the decision in *Doherty* was that the exception had the potential to become the norm through circuitous means, resulting in a latent feasibility for the fusion of the two gateways. Even Lord Hope in *Doherty*⁶¹ recognised that, “the two routes, or ‘gateways’, may be said to work together to address the incompatibility due to the lack of a procedural safeguard, which is the fundamental point that is at issue in this case”.⁶²

Gateway (b) is, therefore, not limited to judicial review which must be brought in the High Court with permission. Such permission was not usually granted where the challenge depended on disputed issues of fact. To be compliant with Art 8, it must be possible to challenge the lawfulness of the decision of the local authority to recover possession by way of defence in the possession proceedings. When Lord Walker highlighted in *Doherty*⁶³ the irony of the verbal incongruity of “conventional judicial review grounds” being used to mean “grounds that have nothing to do with the European

⁵⁵ *Doherty v Birmingham City Council* [2008] UKHL 57; [2009] 1 AC 367 at [52] per Lord Hope, referring to *Wandsworth London Borough Council v Winder* [1985] AC 461.

⁵⁶ *Doherty v Birmingham City Council* [2008] UKHL 57; [2009] 1 AC 367 at [52] per Lord Hope, repeating what he stated in *Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 AC 465 at [114].

⁵⁷ *R (On the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 AC 295 at [51] per Lord Slynn.

⁵⁸ *R (Association of British Civilian Internees (Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473; [2003] QB 1397 at [35] per Dyson LJ.

⁵⁹ *Doherty v Birmingham City Council* [2008] UKHL 57; [2009] 1 AC 367 at [55].

⁶⁰ *Doherty v Birmingham City Council* [2008] UKHL 57; [2009] 1 AC 367 at [55].

⁶¹ *Doherty v Birmingham City Council* [2008] UKHL 57; [2009] 1 AC 367 at [53].

⁶² Lord Walker agreed in *Doherty v Birmingham City Council* [2008] UKHL 57; [2009] 1 AC 367 at [106] that: “The two gateways are not necessarily exclusive alternatives”.

⁶³ *Doherty v Birmingham City Council* [2008] UKHL 57; [2009] 1 AC 367 at [109].

Convention on Human Rights”, the path ahead became unequivocal, with the consequence that proportionality has arguably now been accepted as “an ‘indigenous’ ground of judicial review”.⁶⁴

The decisions in *Pinnock* and *Powell* are welcome, because they offer alternative ways of channelling defences in addition to gateway (b). The *Wednesbury* test remains important, and advocates should always plead both jurisdictions. The reason is that there may be cases where the actions of the public authority in seeking possession are proportionate, particularly in view of the significance of unencumbered property rights and public obligations of estate management, but the actions may still be perverse in the *Wednesbury* sense. Gateway (b) in such circumstances will assume a significance of its own, examining natural justice, legitimate expectations and procedural irregularity. Gateway (b) has not relied on Art 8 in the past, since it derived from the common law jurisdiction in *Wandsworth London Borough Council v Winder* [1985] AC 461. Although “there is an overlap between the traditional grounds of review and the approach of proportionality”,⁶⁵ it is clear that the “differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results”.⁶⁶ Therefore, following *Pinnock* and *Powell*, the *Wednesbury* test should not be regarded as diminished in significance and must not be consigned to the graveyard of antiquated doctrines.

The impact of human rights on proprietary certainty in English land law

The advantage of an automatic right to possession is that it provides certainty, creating clear rights and obligations and avoids inconsistency between decisions, increased costs and consequent delays. By way of contrast, as a result of *Pinnock* and *Powell*, requiring possession to be subject to Art 8(2) is blurring clear and distinct property rules and may result in unpredictability. As Rose has argued, the problem of substitution of “mud” rules for “crystal” ones is that we substitute fuzzy, ambiguous rules for what seem to be perfectly clear demarcations of entitlement.⁶⁷ The result of Art 8 is the acquisition of a new form of proprietary protection or the engrafting of a “new equity” onto property relationships.⁶⁸ Equity ameliorates the harshness of the law and, similarly, Art 8(2) takes the hard edge off harsh rules to give proprietary protection to an occupier in circumstances where an occupier would otherwise have no defence to an order for possession.

If *Qazi* is regarded as the zenith of certainty in land law, with the majority of the House of Lords refusing to allow Art 8(2) to import elements of inconsistency into an automatic right to possession, then the issue is the effect of *Pinnock* and *Powell* on that thesis. It is arguable that the practical reality is that *Pinnock* and *Powell* may not in fact deviate far from that thesis. Since both cases ascribe great significance to unencumbered property law rights, these rights, together with public law obligations, present an almost unassailable case. This is especially so where prescriptive statutory regimes are concerned, which require pre-court bureaucratic review processes; and even more so where the pre-court review process is a reasonableness requirement, as in the case of the demoted tenancy regime.

Analysing the *Powell* case itself, if Ms Powell had not been offered suitable alternative accommodation, the case would have been remitted to the county court for a consideration of Art 8 proportionality in the light of her personal circumstances.⁶⁹ Giving effect to the order for possession would make Ms Powell homeless again, so the local authority would be obliged to rehouse her unless she was found to be intentionally homeless or not to have a priority need. By the time of the Supreme Court decision, Ms Powell had four children under the age of six. The original reason that Hounslow

⁶⁴ A phrase used by Loveland I, “A Tale of Two Trespassers: Reconsidering the Impact of the Human Rights Act on Rights of Residence in Rented Housing: Part 2” [2009] 4 EHRLR 495 at 499. See also Loveland I, “Defending Ground 8 Residential Possession Claims Through Article 8 of the European Convention on Human Rights” [2009] 73 Conv 396.

⁶⁵ *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532 at [27] per Lord Steyn.

⁶⁶ *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532 at [28] per Lord Steyn.

⁶⁷ Rose CM, “Crystals and Mud in Property Law” (1987-1988) 40 Stan L Rev 577 at 578.

⁶⁸ See Gray K and Gray SF, *Land Law (Core Text Series)* (6th ed, Oxford University Press, 2009) at [1.132]-[1.133].

⁶⁹ *Hounslow LBC v Powell* [2011] UKSC 8; [2011] 2 WLR 287 at [66].

issued a claim for possession of the premises was that there were substantial arrears of rent, which were not covered by the initial credit of housing benefit and which remained unpaid. By the time of the Supreme Court hearing, the family was in receipt of various benefits including housing benefit which covered all of the rental liability. In practice, it is unlikely that a county court would hold that the decision of a public authority landowner is not proportionate, because the tenant's personal circumstances will place the local authority under an obligation to rehouse. Therefore, it will only be extremely rarely that unencumbered property rights will be undermined, because of the extensive nature of landlords' public law obligations.

However, if a court does exercise its discretion not to grant possession, the question is what type of tenancy the occupiers will have. County court judges would benefit from guidance from the Supreme Court on: whether the determined tenancy would merely be revived; whether a "contingent tenancy" would arise which would continue, for example, until the children leave home; and whether the tenancy would automatically become secure if it was secure prior to the termination of the tenancy.⁷⁰ Furthermore, the acceptance by the Supreme Court that certain statutory and procedural provisions may need to be revisited⁷¹ is recognition of the overhaul required to make housing law compliant with Art 8. The flexible tenancy regime proposed in the *Localism Bill* (UK), with its written notice, reasons, review and time period provisions, may comply with the principles enunciated in *Pinnock* and *Powell*, and time will tell how the mandatory ground for possession will interact with Art 8. The aim of the legislation may be to make successful proportionality challenges less likely to succeed, but there is no evidence of this being the rationale.

English courts have not traditionally taken a rights-based approach to social housing and have in effect adopted a "managerial" approach; the focus being not on the tenants as right-holders, but on the needs of local authorities to distribute their scarce resources effectively.⁷² The *Human Rights Act* presents a challenge to this outlook, threatening to shift the focus from the needs of the landlord to the rights of occupiers. The rationale that the local authority has the right to take possession because this vindicates its right to take possession is circular. The distribution and management of housing stock is conducive to sound estate management, but is the antithesis of an approach based on individual rights.⁷³

It is significant that the pragmatic approach adopted by the Supreme Court may paradoxically redress the balance in favour of local authorities and social landlords. A court only has to consider whether it should conduct a proportionality exercise where a tenant requests, which weights the decision in favour of the landowner. The judges agreed that the court should proceed on the basis that the landlord has sound management reasons for seeking a possession order.⁷⁴ Lord Hope is noticeably concerned to retain the presumption in favour of the landowner by rejecting a "structured approach" argued for by Mr Luba, counsel for the tenant, Ms Powell.⁷⁵ A "structured approach" to the issue of proportionality would require the interests of the local authority to be balanced against those of the occupier, and such an approach was rejected because it would destroy the distinction between secure and non-secure tenancies. Lord Hope is endeavouring to retain the distinction between secure and non-secure tenancies, which is a pivotal distinction to maintain.

⁷⁰ Loveland I, "The Shifting Sands of Article 8 Jurisprudence in English Housing Law" [2011] EHRLR 151 at 165.

⁷¹ *Manchester City Council v Pinnock* [2010] UKSC 45; [2010] 3 WLR 1441 at [63], though see *Hounslow LBC v Powell* [2011] UKSC 8; [2011] 2 WLR 287 at [57]-[64] where Lord Hope declined to make a declaration of incompatibility in relation to *Housing Act 1980* (UK), s 89.

⁷² Latham A, "Talking Without Speaking, Hearing Without Listening? Evictions, the Law Lords and the European Court of Human Rights" [2011] PL 730 at 732.

⁷³ Latham, n 72 at 741.

⁷⁴ *Hounslow LBC v Powell* [2011] UKSC 8; [2011] 2 WLR 287 at [35].

⁷⁵ *Hounslow LBC v Powell* [2011] UKSC 8; [2011] 2 WLR 287 at [40]. Mr Luba used *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 at [19]-[20] in support of his proposition, but Lord Hope in *Powell* at [41] rejected it, arguing that it may be appropriate in contexts such as immigration control which was the issue in that case, but not in the context of this case.

Proportionality, as interpreted by the Supreme Court, therefore restores a level of autonomy to national authorities to enable prioritising of social and economic factors together with relevant policy considerations, so long as proportionality has been determined. The European Court has offered little guidance as to the meaning of proportionality, and the English cases have not concerned the substantive meaning of proportionality, but rather the procedural requirement for independent determination.⁷⁶ The practical consequence of the cases is that the extent of the extra protection which proportionality will offer social housing tenants will be gauged on a case by case basis. The reality, however, is that the impact of Art 8 on proprietary certainty in English law may not be as drastic as was initially anticipated following the decision in *Pinnock*.

Examining other areas of land law, one area in which Art 8 and Art 1 of the First Protocol may have impact is mortgagee possession cases. In *Horsham Properties Group Ltd v Clark* [2008] EWHC 2327; [2009] 1 WLR 1255, Briggs J held that the exercise of the statutory power of sale under the *Law of Property Act 1925* (UK), s 101, after a relevant default by the mortgagor, was not a deprivation of possessions within Art 1, and the claimant was entitled to possession of the property. In making that decision, Briggs J relied on the House of Lords decision in *Qazi*, which means that cases involving facts similar to *Horsham* will now have to be re-evaluated. The potential scope of the *European Convention on Human Rights* in mortgagee possession cases is open to debate, and Lindberg has argued that the conjunctive factors of state encouragement of home ownership, financial deregulation, inadequate legal protection and an ineffective regulatory framework have precipitated home repossessions to the extent that the United Kingdom may be in violation of its positive obligations under Art 8.⁷⁷

There have been some ramifications from human rights in relation to orders for sale under the *Trusts of Land and Appointment of Trustees Act 1996* (UK), s 14. In *National Westminster Bank Plc v Rushmer* [2010] EWHC 554; [2010] FLR 362, Arnold J held that the power to enforce a charging order was compatible with the Convention, since:

it will ordinarily be sufficient for this purpose for the court to give due consideration to the factors specified in section 15 of TOLATA. That will ordinarily enable the court to balance the creditor's rights, which include its rights under Article 1 of the First Protocol, with the Article 8 rights of those affected by an order for sale.⁷⁸

Arnold J does not:

rule out the possibility that there may be circumstances in which it is necessary for the court explicitly to consider whether an order for sale is a proportionate interference with the Article 8 rights of those affected, but I do not consider that this will always be necessary.⁷⁹

Prior to *Rushmer*, the courts had not considered the effect of human rights under these provisions of the 1996 Act.⁸⁰ Arnold J adopts a balanced approach, emphasising that the family's interests were balanced against those of the bank, and articulating the importance of taking Art 8 into consideration, thus demonstrating that the impact of human rights has spread to this area.

On an application for sale by a beneficiary's trustee in bankruptcy, the criteria in the *Insolvency Act 1986* (UK), s 335A(2), apply, although after one year "the court shall assume, unless the circumstances of the case are exceptional, that the interests of the bankrupt's creditors outweigh all other considerations".⁸¹ In *Barca v Mears* [2004] EWHC 2170; [2005] 2 FLR 1 at [40]-[42], Nicholas Strauss QC queried whether it was incompatible with Convention rights to follow the narrow approach

⁷⁶ Arden, n 49 at 48.

⁷⁷ See Lindberg PT, "Defend My Castle: Is the UK in Violation of Article 8 of the European Convention of Human Rights?" (2010) Denning LJ 1 at 33.

⁷⁸ *National Westminster Bank Plc v Rushmer* [2010] EWHC 554; [2010] FLR 362 at [50].

⁷⁹ *National Westminster Bank Plc v Rushmer* [2010] EWHC 554; [2010] FLR 362 at [50].

⁸⁰ See, eg *Bank of Ireland Home Mortgages Ltd v Bell* [2001] 2 All ER (Comm) 920, *First National Bank Plc v Achampong* [2003] EWCA Civ 487; [2004] 1 FCR 18, *Edwards v Lloyds TSB Bank Plc* [2004] EWHC 1745; [2005] 1 FCR 139.

⁸¹ *Insolvency Act 1986* (UK), s 335A(3).

to exceptional circumstances taken by the majority in *Re Citro* [1991] Ch 142 and wondered whether “a shift in emphasis in the interpretation of the statute may be necessary to achieve compatibility with the Convention”.⁸² He emphasised that “a reconsideration of the sections in the light of the Convention” and “without the possibly undue bias in favour of the creditors’ property interests” could make these sections compatible with the Convention.⁸³ However, in *Nicholls v Lan* [2006] EWHC 1255; [2007] 1 FLR 744, the court held that the rights of the bankrupt’s wife under the *Human Rights Act* had not been breached, and the view of the judge, Paul Morgan QC, was that:

I do not see that the statutory test, leading to a balancing exercise, is inconsistent with the qualified nature of the rights enshrined in Article 8 and in Article 1 of the First Protocol. Indeed, it might be contended that section 335A precisely captures what is required by Article 8 and Article 1 of the First Protocol.⁸⁴

Nicholls v Lan has therefore diluted the misgivings expressed in *Barca v Mears*. In the long term, however, it is likely that the Convention will have an impact on the interpretation of “exceptional circumstances”.⁸⁵

In the area of adverse possession, the Court of Appeal in *Ofulue v Bossert* [2008] EWCA Civ 7; [2009] Ch 1 (taken on appeal to the House of Lords on other grounds) followed *Pye* and held that the law on adverse possession is compliant with the Convention, and there were no special circumstances in that case justifying departing from that decision. Arden LJ recognised, in *Ofulue v Bossert*,⁸⁶ the wide margin of appreciation given by the European Court to contracting states in *Pye* and held that there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised, with the consequence that there was no violation of Art 1 of the First Protocol. “Special circumstances” were given a narrow and limited definition by Arden LJ, clarifying that “special circumstances justifying departure might exist if the domestic court were satisfied that the Strasbourg court has misunderstood the effect of domestic law”.⁸⁷ Arden LJ was unwilling to distinguish the decision in *Pye* based on the facts of the case or by reference to the applicability of the policy reasons for adverse possession identified by the Law Commission.⁸⁸

In relation to overreaching, human rights have not yet had an impact. The mechanism of overreaching is a statutory device to enable owners of a legal estate to make a disposition free of the beneficial interests that previously bound the estate, as long as the proceeds of sale or other capital money are paid to at least two trustees or a trust corporation.⁸⁹ *City of London Building Society v Flegg* [1988] AC 54 demonstrated how two elderly and innocent beneficial owners lost their home and their savings due to the operation of overreaching.⁹⁰ In *State Bank of India v Sood* [1997] 1 WLR 1568, the interests of the beneficiaries were not protected by the two trustee rule, which did not have to be complied with because there was an overdraft mortgage and no capital money arose contemporaneously with the disposition. In *National Westminster Bank Plc v Malhan* [2004] EWCA Civ 847; [2004] 2 P & CR DG 9, the Vice Chancellor would not countenance the suggestion that the discrepancy in treatment between the position where there is one trustee as opposed to two trustees

⁸² *Barca v Mears* [2004] EWHC 2170; [2005] 2 FLR 1 at [41].

⁸³ *Barca v Mears* [2004] EWHC 2170; [2005] 2 FLR 1 at [42]. See further Baker A, “The Judicial Approach to ‘Exceptional Circumstances’ in Bankruptcy: The Impact of the Human Rights Act 1998” [2010] 74 Conv 352.

⁸⁴ *Nicholls v Lan* [2006] EWHC 1255; [2007] 1 FLR 744 at [43].

⁸⁵ In *Everitt v Budhram* [2009] EWHC 1219; [2010] Ch 170, the Convention does not appear to have been raised at all in argument, but the court did suspend the possession order, due to the husband’s mental health and medical condition which constituted exceptional circumstances. The suspension was until the earlier of two events, either for one year or for three months after possession had been ordered against the husband.

⁸⁶ *Ofulue v Bossert* [2008] EWCA Civ 7; [2009] Ch 1 at [50]-[57].

⁸⁷ *Ofulue v Bossert* [2008] EWCA Civ 7; [2009] Ch 1 at [32].

⁸⁸ *Ofulue v Bossert* [2008] EWCA Civ 7; [2009] Ch 1 at [52]-[53].

⁸⁹ *Law of Property Act 1925* (UK), s 2 and s 27(2).

⁹⁰ See Thompson MP, “Dispositions by Trustees for Sale” [1988] 52 Conv 108; Harpum C, “Overreaching, Trusts of Land and Proprietary Estoppel” (2000) 116 LQR 341; Jackson N, “Overreaching in Registered Land Law” (2006) 69 MLR 214.

might amount to a breach of Art 8, Art 1 of the First Protocol, or Art 14 (prohibition of discrimination). As the Vice Chancellor stressed, he did not have to comment on the *Human Rights Act*, because the facts arose before the Act came into force. He agreed that the arguments for the Bank as to compatibility had “much force”,⁹¹ but one of the cases he cited in support of that proposition was *Qazi*. It is likely that a case with facts similar to *Flegg* or *Sood* will lead to a reconsideration of the statutory provisions due to the severe effects of overreaching on the beneficiaries in actual occupation. It may be time for a rebalancing of the competing interests, so that the impediments to an unencumbered title by purchasers and mortgagees receive the scrutiny which they deserve.

Possession proceedings based on fair outcomes?

In relation to possession proceedings, the decisions in *Pinnock* and *Powell* may be viewed as a turning point, leading the way in the future to a broad-based system of law. The modern Strasbourg formulation is “proportionality and reasonableness” as highlighted by Lord Neuberger in *Pinnock* who stated that:

no order for possession can be made against a secure tenant unless, inter alia, it is reasonable to make the order. Any factor which has to be taken into account, or any dispute of fact which has to be resolved, for the purpose of assessing proportionality under article 8(2), would have to be taken into account or resolved for the purpose of assessing reasonableness ...⁹²

Reasonableness and proportionality appear to be equated with no conceptual differentiation between them. Article 8(2) may evolve to remove the most fundamental distinction between cases where reasonableness is and is not a requirement for eviction. As Lord Neuberger recognised in *Pinnock*, where domestic law imposes no requirement of reasonableness, and gives an unqualified right to possession, “the court’s obligation under article 8(2) ... does represent a potential new obstacle to the making of an order for possession. The wide implications of this obligation will have to be worked out”.⁹³ The same view was taken by Lord Hope and Lord Phillips in *Powell*.⁹⁴ There is, however, no exact equivalence between proportionality and reasonableness; for example, because secure/assured tenancy status renders irrelevant factors which might from a proportionality perspective point towards eviction being proportionate.⁹⁵ Therefore, it remains to be seen whether a more nuanced approach to reasonableness and proportionality, which acknowledges the subtle differentiation between the two concepts with recognition of their divergent provenances, will materialise in the future.

From the perspective of the landlord, failing to give a landlord possession when he is entitled under domestic law is perceived as an infringement of his right to peaceful enjoyment of his property under Art 1 of the First Protocol. However, the modern approach of the European Court of Human Rights is to take a more robust approach to the protection of a private tenant’s rights under Art 8.⁹⁶ In *Belchikova v Russia* (App No 2408/06, March 25 2010), the European Court of Human Rights was clearly of the view that Art 8 was engaged where the applicant faced the loss of her home due to a possession order, even though the claimants were private individuals. Indeed, the applicant lost because the decision to evict her was proportionate. In *Zehentner v Austria* (2011) 52 EHRR 22, there was violation of Art 8 where the applicant, who was evicted from her home, lacked legal capacity, and a guardian was subsequently appointed due to her severe mental illness. Similarly, in *Orlic v Croatia*

⁹¹ *National Westminster Bank Plc v Malhan* [2004] EWCA Civ 847; [2004] 2 P & CR DG9 at [53]. See also *Birmingham Midshires Mortgage Services Ltd v Sabherwal* (2000) 80 P & CR 256 at [34], where Robert Walker LJ refused to consider the effect of the *Human Rights Act 1998* (UK), because it was not yet in force and the mortgage lender was not a public body.

⁹² *Manchester City Council v Pinnock* [2010] UKSC 45; [2010] 3 WLR 1441 at [55].

⁹³ *Manchester City Council v Pinnock* [2010] UKSC 45; [2010] 3 WLR 1441 at [57].

⁹⁴ *Hounslow LBC v Powell* [2011] UKSC 8; [2011] 2 WLR 287 at [34] and [79] respectively.

⁹⁵ Loveland, n 70 at 164, giving the example in fn 51 of extreme under-occupation of premises not being a ground for possession against a secure or assured tenant.

⁹⁶ Luba J, “Is There a ‘Human Rights Defence’ to a Possession Claim Brought by a Private Landlord?” (2011) 15 L & T Review 79 at 80.

(App No 48833/07, June 21 2011), the court did not accept that the grant of the right to the applicant to raise an issue under Art 8 would have serious consequences for domestic law and held that there had been a violation of Art 8.

Consequently, how could the law become based on fairness? Pressure from the European Court of Human Rights for a more even balancing of interests of the owner and occupier may lead to a shift further towards the interests of the occupier. Article 8 proportionality may position personal circumstances of occupiers as central to an evaluation of what is “necessary in a democratic society” under Art 8(2). As counsel will be arguing on behalf of occupiers who “are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty”⁹⁷ or as a result of myriad other circumstances, judges’ sympathies with occupiers may outweigh owners’ legitimate aims. While social housing is in short supply, delays in eviction will be to the detriment of others in need of housing, but such rights are not adequately protected by Art 8.

The effect of Art 8(2) on landowners has the potential, therefore, to invert certainty-based land law principles and replace them with justice-based land law. It is a moot point whether the European Convention impacts only on public authority landowners and, indeed, the issue was not settled in the Supreme Court by Lord Neuberger in *Pinnock*. Lord Neuberger emphasised that “nothing we say is intended to bear on cases where the person seeking the order for possession is a private landowner”⁹⁸ and “[n]o doubt in such cases article 1 of the First Protocol to the Convention will have a part to play, but it is preferable for this court to express no view on the issue until it arises and has to be determined”.⁹⁹ Lord Neuberger did not refer to Lord Hope’s view expressed in *Kay v Lambeth LBC*¹⁰⁰ that his judgment applied to public and private landlords. Since it is unlawful for a public authority to act in a way which is incompatible with a Convention right, and a public authority includes a court or tribunal, the debate about horizontal application focuses on whether a court deciding a case must decide in accordance with the Convention in cases between private parties as well as against a public authority. The argument in favour of vertical effect only is that the rights are rights only against national governments, or their public law emanations, and not rights against citizens, so that Convention rights can only be asserted against public bodies.¹⁰¹ The contrary view has its foundations in the opinion that the disjunctive manner in which the two limbs of Art 8, for example, are expressed, indicates clearly that it is capable of much wider meaning, so that the first limb is stating an unlimited general right, and the provision about public authorities in the second limb is necessary in order to provide for exceptions.¹⁰²

A further complication is the blurring of the boundaries between private landlords as opposed to public authority landlords. Private landlords cannot be treated as a distinct category. One sub-category is private landlords who provide accommodation for homeless people, and Lord Mance in *YL v Birmingham City Council* [2007] UKHL 27; [2008] 1 AC 95 at [85] left open the question whether private landlords fall within the *Human Rights Act*, s 6(3)(b),¹⁰³ whenever the accommodation is paid for by public funding, even if only by housing benefit. The expansion to this category of landlords

⁹⁷ *Manchester City Council v Pinnock* [2010] UKSC 45; [2010] 3 WLR 1441 at [64] per Lord Neuberger.

⁹⁸ *Manchester City Council v Pinnock* [2010] UKSC 45; [2010] 3 WLR 1441 at [4].

⁹⁹ *Manchester City Council v Pinnock* [2010] UKSC 45; [2010] 3 WLR 1441 at [50].

¹⁰⁰ *Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 AC 465 at [64] and [75].

¹⁰¹ Buxton R, “The Human Rights Act and Private Law” (2000) 116 LQR 48 at 50-52, whose view is that the *Human Rights Act 1998* (UK) does not create private law rights.

¹⁰² Wade HWR, “Horizons of Horizontality” (2000) 116 LQR 217 at 218-219, who argues that courts must give effect to Convention rights, so that full horizontal effect is achieved. For a range of views, see also Pattinson SD and Beyleveld D, “Horizontal Applicability and Horizontal Effect” (2002) 118 LQR 623; Hunt M, “‘The Horizontal Effect’ of the Human Rights Act” [1998] PL 423; Bamforth N, “The Application of the Human Rights Act 1998 to Public Authorities and Private Bodies” [1999] CLJ 159; Phillipson G, “The Human Rights Act, Horizontal Effect on the Common Law: A Big Bang or a Whimper?” (1999) 62 MLR 824; Leigh I and Lustgarten L, “Making Rights Real: The Courts, Remedies, and the Human Rights Act” [1999] CLJ 509.

¹⁰³ *Human Rights Act 1998* (UK), s 6(3) states that a public authority includes “(b) any person certain of whose functions are functions of a public nature”.

would have a substantial effect on private landlords and the private lettings market. This may become more of an issue once the *Localism Bill* has been enacted. Furthermore, registered social landlords¹⁰⁴ and private registered providers can be regarded as quasi-public bodies for the purposes of judicial review proceedings and the *Human Rights Act*, s 6. Registered providers are in fact hybrid authorities, exercising both public and private functions, and they may be considered to be a public body if their housing management and allocation functions are deemed to be public functions. Elias LJ in *R (Weaver) v London and Quadrant Housing Trust* [2009] EWCA Civ 587; [2010] 1 WLR 363 at [66]-[72] established that the relevant criteria include the following: the substantial public subsidy which enables the trust to achieve its objectives; whether the trust in its allocation of social housing operates in very close harmony with the local government, assisting it to achieve the authority's statutory duties and objectives; and whether the provision of subsidised housing is a function which can be described as governmental, since the provision of subsidy to meet the needs of the poorer section of the community is a governmental function. The extension of the *Human Rights Act* to different housing providers will undoubtedly have far-reaching consequences.

The reality in English law is that the impact on private rights between individuals in land law has been extremely limited.¹⁰⁵ In *Murphy v Wyatt* [2011] EWCA Civ 408 at [80], Arden LJ left open the question of the effect of Art 8 in a claim by a private landlord for possession of a piece of land where the tenant lived, but realised that "the court hearing any further application for possession of the site may have to do so". Arden LJ was merely speculating because, at present, disputes between private individuals do not come within the *Human Rights Act*, but if broad horizontal application is adopted in the future, the whole body of land law will be open to review, and every settled principle of land law may be open to scrutiny under the *Human Rights Act*.¹⁰⁶ The county courts are dealing, on a daily basis, with cases where "mandatory" possession is available against assured shorthold tenants and fully assured tenants.¹⁰⁷ It is, therefore, inevitable that the courts will have to grapple with the issue, with the consequence that possession proceedings may be decided on the basis of fair outcomes in the near future, where judges have to decide between a landlord entitled to possession and a tenant with unusual and challenging personal circumstances.

CONCLUDING REMARKS

The 21st century paradox in land law is a human rights one. English land law is an outsider to a system of European property law, with the consequence that the threat to the autonomy of English land law seems a remote possibility at present. However, human rights are progressively reshaping the juridical basis of the law in relation to public authority landowners and potentially a wider category of landowners. The *Human Rights Act* has made and will continue to make significant inroads, because new dimensions of land entitlement will continue to alter the parameters of proprietary rights by superimposing a layer of additional protection on the tenant or occupier of land. The real friction in English land law, between issues concerning autonomy, human rights, equality and accommodation of diversity, is epitomised by the central paradox of its demand for certainty, championing independence and prioritising fundamental values.

The law had remained relatively static in relation to tensions in previous centuries and, while there continues to be some resistance, it is equally clear that there is an admission that the regimes governing English land law are due a change. From a functional perspective, the variety of forces has led to a wider frame of discourse, with the Convention influencing "the shape and development of our domestic law principles, whether one uses the metaphors of embedding, weaving into the fabric,

¹⁰⁴ *Housing and Regeneration Act 2008* (UK), ss 110-121, have replaced the registered social landlord in England with an extended class of "registered providers" of social housing.

¹⁰⁵ See Howell J, "The Human Rights Act 1998: Land, Private Citizens, and the Common Law" (2007) 123 LQR 618 at 629-635; Howell J, "The Human Rights Act 1998: The "Horizontal Effect" on Land Law" in Cooke E (ed), *Modern Studies in Property Law* (Hart Publishing, 2001), Vol 1, p 149; Howell J, "Land and Human Rights" [1999] 63 Conv 287.

¹⁰⁶ Howell (2007), n 105 at 635.

¹⁰⁷ Luba, n 96 at 82, argues that the legislature should have retained the *Rent Act* position that most tenants could not be evicted unless the court considers it reasonable to make a possession order.

osmosis or alignment”.¹⁰⁸ It is ironic that it was partly due to the lack of a unified judicial approach in England which facilitated moves towards embracing a human rights agenda to land law, with the consequence that Convention rights are being assimilated gradually into English law until they are “woven into the fabric of domestic law”.¹⁰⁹

Due to litigation being encouraged by the relative uncertainty of the impact of human rights on land law, it is imperative that the Supreme Court analyses further, from a microcosmic perspective, when and how it is practicable to take individual circumstances into account to justify the stance advocated being a proportionate response to attaining a legitimate aim. It also needs to analyse, from a macrocosmic perspective, to what extent the European Convention is recasting basic principles of land law. As Rose stated:

the rhetoric of crystals focuses on the sense of predictability and security present in longterm dealings, while the doctrine of mud focuses on the flexibility and willingness to make adjustments that longterm dealings normally offer.¹¹⁰

Opening the floodgates of personal circumstances will lead to unforeseen consequences with the decisions of county court judges becoming increasingly speculative. The culmination of the 20th century with the passage of the *Human Rights Act* and the advent of the 21st century have witnessed the reinforcement of basic principles of personal autonomy and the upholding of an individual’s own human value. These raise the issue of whether we are discarding the desirability of rules and are losing the sense of collective order in favour of being concerned with individuals and individualised notions of fairness and justice.

¹⁰⁸ *Doran v Liverpool City Council* [2009] EWCA Civ 146; [2009] 1 WLR 2365 at [52], referring to the opinion of Lord Walker in *Doherty v Birmingham City Council* [2008] UKHL 57; [2009] 1 AC 367 at [109].

¹⁰⁹ Lord Walker in *Doherty v Birmingham City Council* [2008] UKHL 57; [2009] 1 AC 367 at [109], quoting from an observation of Anthony Lester QC and David Pannick QC.

¹¹⁰ Rose, n 67 at 605.